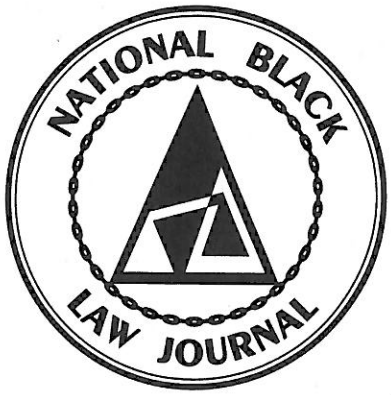
COLUMBIA Edition Volume 18: Number 2



LATINOS AND SECTION 5 OF THE VOTING RIGHTS ACT: BEYOND BLACK AND WHITE

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Reprinted from
NATIONAL BLACK LAW JOURNAL
Volume 18, Number 2

ARTICLE

LATINOS AND SECTION 5 OF THE VOTING RIGHTS ACT: BEYOND BLACK AND WHITE

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The debate over the reauthorization of key sections of the Voting Rights Act has attracted some early attention in the mainstream media and within academia even though these provisions will not expire until 2007. Two critical provisions of the Voting Rights Act are at stake: Section 5 of the Act,[1] which is easily the strongest, most aggressive provision of the statute and applies only to select areas of the country; and Section 203 of the Act,[2] which contains the Act's bilingual assistance provisions which apply only to citizens of Spanish, Native American, Asian, and Alaskan heritage, and is also of limited geographic scope. Latino voting rights advocates should welcome this preview because it highlights how the initial national debate encapsulates the Voting Rights Act and its future viability in a limited racial construct of black and white concerns. With the ever-growing Latino population now exceeding the African-American population in the country, one would think that this early debate over the Act, as well as the earlier over-arching discourse about the validity of majority-minority districts, affects only one of the nation's minority groups. Indeed, since Latinos stereotypically are only concerned with the language minority provisions and blacks are, presumably, only concerned with Section 5, the racial cast is set. Add the meritorious concerns of Asian Americans and Native Americans to this mix, or to the language side of the mix if you will, and you have the perfect convergence of the upcoming battle for reauthorization that, so far, appears to pigeonhole each national minority group into limited, shortsighted roles. The truth is that the Voting Rights Act ("VRA") was initially and deservedly aimed at restoring the dignity of African-American voters, but even in 1965, it was never just black and white. This essay begins by telling the story in Parts I and II of how the Puerto Rican community in the United States was instrumental in shaping the VRA's policies towards Latinos regarding both Section 5 and Section

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1. 42 U.S.C. § 1973c (2000).
2. 42 U.S.C. § 1973aa-1a (2000).

203 protections. Part III focuses on the Section 5 coverage amendments of the 1970s by using Texas as an example of how the VRA also addressed rampant discrimination against Mexican American voters. The essay then ends in Part IV by delving into the larger debate over majority minority districts in the United States and how Latino leaders in the Democratic Party skipped a critical beat in the dance performed by Democratic Party loyalists when, as compared to their African American counterparts in the party, they jumped on the influence district bandwagon, without first assuring some semblance of representational parity in many legislatures that govern Latino communities. In the end, it is also hoped that this essay will disabuse our political leaders of the notion that Latinos are not concerned about the continued viability and necessity of Section 5 protections in a newly amended VRA.

I. Puerto Ricans and Section 4(e) of the VRA

The migration of Puerto Ricans[3] to the United States and their impact on the political framework of local politics in this country is neither of recent vintage nor of limited geographical scope. New York City has been considered the epicenter of Puerto Rican life in this country at least through the late 1990s, and it enjoys a long history of Puerto Rican progressive electoral activism starting in the first half of the 20th century. The historical period between the two World Wars saw intense political activism among Puerto Ricans in New York with 36 vibrant political and social organizations created and a voter registration rate of fifty percent.[4] The Puerto Rican population in the city increased by 50% from 1930 to 1940 and then quadrupled from 1940 to 1950.[5] In this era Puerto Rican voters easily gravitated to Vito Marcantonio, an Italian Congressman from East Harlem, who became a tireless advocate for the working poor and the oppressed and a champion of Puerto Rican independence. Recognized as the "de facto Congressman for Puerto Rico,"[6] and initially elected on the Republican line and subsequently on the American Labor Party ticket, Mr. Marcantonio not only proposed legislation in 1936 to establish Puerto Rico's independence from the United States but also sought legislation to compensate Puerto Ricans for the colonial domination of their country.[7] Marcantonio's radicalism and his constant attacks upon the country's colonial dominance of the island, even after the so-called Commonwealth solution,

3. In 1917 Congress declared Puerto Ricans citizens of the United States. This status was re-codified in 8 U.S.C. § 1402.

4. Edgardo Meléndez, *Puerto Rican Politics in the United States: Examination of Major Perspectives and Theories*, 15 CENTRO Journal 9, 29 (2003).

5. Andrés Torres, Between Melting Pot and Mosaic: African Americans and Puerto Ricans in the New York Political Economy 65 (1995) (In 1930 Puerto Ricans in New York City numbered 44,900, by 1940 it was up to 61,500 and up to 246,000 in 1950.).

6. Gerald Meyer, Vito Marcantonio: Radical Politician 1902 – 1954 171 (1989) ("This is why Jesús Colón, a left-wing journalist writing in the fifties, could declare with such confidence that the "American idol" of Puerto Ricans "was and still is Vito Marcantonio."). *See* Memoirs of Bernardo Vega: A Contribution to the History of the Puerto Rican Community in New York 183 (Juan Flores trans., Cesar Andreau Iglesias ed., Monthly Review Press 1984) (Bernardo Vega refers to Marcantonio as a "champion of the poor and advocate for the Puerto Rican people.").

7. Felix Ojeda Reyes, Vito Marcantonio y Puerto Rico 22 (1978).

proved too much for the entrenched power elite of the city and led to concerted efforts to defeat him and in turn destabilize the burgeoning Puerto Rican voting bloc in the city.[8] This newfound political strength, which began with Marcantonio, spilled over into the subsequent election of the first Puerto Rican official in the United States in 1937, Oscar García Rivera, to the New York State Assembly on the Republican and American Labor Party line. Eventually, the Liberal Party, which as the political arm of the garment workers union (I.L.G.W.U.) was already a magnet for Puerto Rican unionists in New York, stifled this rising tide of political agitation deliberately. The Liberal Party was a force in local politics but made it a point to block Puerto Ricans from leadership positions and stem the activism of Puerto Rican voters.[9]

Decades later the Puerto Rican community regained a foothold in American politics in the 1960s and 1970s with the election of Herman Badillo, a Democrat, as the first Puerto Rican elected to Congress in 1971. Badillo's congressional legacy was significant for the Puerto Rican community because it coincided with the advent of the Voting Rights Act, resulting in the surge of Puerto Rican elected officials, especially in Bronx County (a Section 5 covered jurisdiction), and created an effective voice for Puerto Rican causes on Capitol Hill that resulted in VRA protection[10] as well as federal sponsorship of bilingual education.[11] His foray into mayoral politics even prompted changes in New York election law to avoid what was termed the "Badillo scare" and make it harder for outside candidates to secure the Democratic nomination for mayor.[12] By the 1990s and into this decade, Puerto Rican political activism solidified in New York with the election of the second Puerto Rican to Congress,[13] this one from Brooklyn, and the emergence of the Bronx as the base of a movement that fielded a viable Puerto Rican candidate for mayor.[14]

Outside of New York, Puerto Rican voters were instrumental in electing another Puerto Rican to Congress from Chicago[15] and in transforming

8. José R. Sánchez, *Puerto Rican Politics in New York: Beyond 'Secondhand' Theory*, *in* LATINOS IN NEW YORK: COMMUNITIES IN TRANSITION 272 (Gabriel Haslip-Viera & Sherrie L. Baver eds., 1996). Indeed, the Mayor's office created a special office to address the needs of Puerto Rican residents deliberately to undermine the support they gave to Vito Marcantonio. "The attack on Marcantonio eventually became part of a larger U.S. government effort to exclude and eliminate radical leadership as well as to demobilize the Puerto Rican community in New York." *Id.* *See also* Meléndez, *supra* note 4, at 18-19.

9. Sánchez, *supra* note 8, at 271 ("The key processes of political exclusion for Puerto Ricans during the 1950s were not from the Democratic Party but from local government and the Liberal Party.").

10. As noted below, Mr. Badillo was one of three Puerto Ricans that testified in Congress in favor of Section 4(e) of the VRA of 1965.

11. The Bilingual Education Act was originally codified at 20 U.S.C. 3281 and has since been substantially modified.

12. Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985).

13. Nydia Velázquez, Democrat, was elected to Congress in 1992 and continues to serve. She is the first and only Puerto Rican woman to serve in Congress. José Serrano represents the Latino congressional district in the South Bronx that went from Herman Badillo to Roberto García to Mr. Serrano.

14. In 2001 Fernando Ferrer, former Bronx Borough President, came in first in the Democratic mayoral primary to force a run-off election which he eventually lost to Mark Green.

15. Luis Gutiérrez became the first Puerto Rican (and first Latino) congressman to be elected from the Midwest. He won on the Democrat line in 1992 and continues to serve. His

the mayoralty and local political base in Hartford,[16] among other success stories – some of which are gender based with Puerto Rican female candidates outperforming Puerto Rican males.[17] As with African Americans, however, none of these inroads would have materialized without the VRA – especially the provisions in Section 5, Section 2 and Section 203.

These inroads, in turn, were presaged by a little known provision of the original VRA, which was directed exclusively to benefit the Puerto Rican community: Section 4(e).[18] In 1965 one of the biggest obstacles to the full enfranchisement of African Americans and a clear target of the VRA were literacy tests. Despite the Supreme Court's pronouncement that literacy tests were facially constitutional,[19] the danger of the tests in the Deep South was in their discriminatory application. As a result, the coverage formula for Section 5's protections specifically included literacy tests among the "tests or devices" that were used to trigger the VRA's most exacting provisions. Section 5's initial geographic scope was limited to a small number of states and jurisdictions, all of them in the South.[20] In 1965, however, the discriminatory use of literacy tests as a prerequisite for voting was not within the exclusive domain of Southern states. New York was a prime example.

New York's literacy test requirement was the ultimate target of Section 4(e) of the VRA and it already had a history of discriminatory use against vulnerable populations of the state. In general, historians have identified Southern and Eastern European immigrants as the target for literacy tests' exclusionary function in the area of immigration.[21] In New York the 1921 state constitutional provision mandating literacy tests for voting was equally exclusionary. As early as 1915 the debates by constitutional delegates established its clear racial purposes.[22]

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initial political victory was the product of a Mexican-American and Puerto Rican alliance that catapulted him to election to the Chicago Board of Alderman over a Mexican-American candidate that was aligned with the political machine that Latinos were trying to derail. LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 235-236 (2002).

16. JOSÉ E. CRUZ, IDENTITY AND POWER: PUERTO RICAN POLITICS AND THE CHALLENGE OF ETHNICITY (1998).

17. GUINIER & TORRES, *supra* note 15, at 162-163. For a similar phenomenon in California where Latina candidates secure more crossover votes than Latinos, *see*, Leo F. Estrada, *Making the Voting Rights Act Relevant to the New Demographics of America: A Response to Farrell and Johnson*, 79 N.C.L. REV. 1283, 1289 (2001).

18. 42 U.S.C. § 1973b(e) (2000).

19. Lassiter v. Northampton County Bd. Of Election, 360 U.S. 45 (1959).

20. Alaska, originally covered under Section Five's protections, successfully sued to be exempted, but was recovered with the subsequent amendments to the VRA. *See*, S. REP. NO. 94-295, fn. 5, at 13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 779. For a discussion on the VRA's application to Native Americans, focusing on South Dakota in particular, *see* Laughlin McDonald, *The Voting Rights Act in Indian County: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43 (2004).

21. The tests "provided a highly 'respectable' cultural determinant which could also minister to Anglo-Saxon sensibilities." JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860 – 1925 101 (New York, Atheneum 1963) (1955).

22. One New York constitutional delegate noted: "More precious even than the forms of government are the mental qualities of our race. They are exposed to a single danger, and that is that by constantly changing our voting citizenship through the wholesale but necessary and valuable infusion of Southern and Eastern European races, whose traditions and inheritances are wholly different from our own, without education, we shall imperil the structure we have so

By mandating English literacy exclusively, New York's literacy test impeded the full participation of Puerto Rican migrants, who used the courts to challenge its discriminatory nature. In *Camacho v. Rogers*,[23] Puerto Rican voters tested the limits of the State's literacy test when applied to citizens from Puerto Rico. Mr. José Camacho was schooled in Puerto Rico in Spanish – itself a feat of decades of Puerto Rican nationalistic struggle against the failed attempts by the United States to Americanize the public schools of the island.[24] He voted in Puerto Rico before migrating to New York but was unable to demonstrate literacy in English under New York law. The plaintiff in *Camacho* was unsuccessful in his Fourteenth and Fifteenth Amendment constitutional challenges. The case is also one of the earliest cases to allege an international law claim, under the Treaty of Paris, the United Nations Charter and the Declaration of Human Rights, to protect the voting rights of Puerto Ricans in the United States. Both the state[25] and federal court dismissed those claims as well. But the issues raised in *Camacho v. Rogers* became the focal point of Puerto Rican political activism for years to come.

As the VRA was winding its way through Congress after the events of Bloody Sunday,[26] the Puerto Rican community in New York was intent on finding a federal legislative solution to the issues raised in *Camacho v. Rogers*. The ultimate result of this effort was Section 4(e), which states in pertinent part:

> 1. Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.
> 2. No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language . . .[27]

The legislative history of this provision of the VRA yields a fascinating picture of the North – South dynamics of discriminatory treatment in the area of voting. With the VRA's emphasis on curing the blatantly discriminatory exclusion of blacks from the political process, the testimony before Congress on how a Northern state, and New York at that, also discrimi-

laboriously struggled to maintain. The danger has begun. It is more imminent than ever before. We should check it." 3 RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1915, BEGUN AND HELD AT THE CAPITOL IN THE CITY OF ALBANY ON TUESDAY THE SIXTH DAY OF APRIL 2912-13 (1915).

23. 199 F. Supp. 155 (S.D.N.Y. 1961).

24. AIDA NEGRÓN DE MONTILLA, AMERICANIZATION IN PUERTO RICO AND THE PUBLIC SCHOOL SYSTEM 1900 – 1930 (Editorial Universitaria, Universidad de Puerto Rico 1975) (1970). For a description of how this "Americanization" policy ties into the voting rights of Puerto Ricans when they arrive in the United States, *see United States v. County Bd. of Elections*, 248 F. Supp. 316, 319-320 (W.D.N.Y. 1965).

25. Camacho v. Doe, 221 N.Y.S.2d 262 (Sup. Ct. 1958), *aff'd*, 7 N.Y.2d 762 (1959).

26. *See The VRA in 28 Days at* www.naacpldf.org/vra.aspx?day=3 (last visited Feb. 28, 2005).

27. 42 U.S.C. § 1973b(e) (2000).

nated against its citizens was welcome news to many. Take for example, the reaction of Senator Holland of Florida:

> [I]n the State of Florida, there are tens of thousands of citizens of Latin American lineage, many of them not yet able to speak in the English language but yet amply educated to know what they are doing. *For years, we have permitted them to vote, and we are very happy in the fact that the great State of New York now turns to us for some guidance in democracy, which we believe the State of New York has needed for a long time.*[28]

With bipartisan support from Senator Robert Kennedy and Senator Jacob Javits, Section 4(e) was touted as an important remedy to the exclusion of Puerto Rican voters who, through Congress' deliberate policies, were schooled substantially in a language other than English, but who were also required under New York constitutional law to demonstrate proficiency in English before exercising the franchise. Indeed, Senator Javits made it a point to grant his full support for the amendment despite his political observation that his party may not stand to benefit from an electorate that is likely to vote for Democrats. His support of the measure within the Republican Party was not an isolated act as then Congressman (and later Mayor) John Lindsay also endorsed the Puerto Rican amendment.

Puerto Rican activists also participated in this debate through the participation of three community leaders who testified before Congress in support of Section 4(e): Herman Badillo, Irma Vidal Santaella and Gilberto Gerena Valentín.[29] Their testimony[30] was clear: New York's English only literacy test requirement was discriminatory on its face and as applied to Puerto Ricans in the city. Estimates were offered that of 730,000 Puerto Ricans in the city of all ages, 150,000 registered to vote but close to 330,000 were prevented from registering. Accounts were given about how literacy test certificates would "suddenly disappear" causing delays of hours, if not the entire day, to replace them, or how basic supplies like pencils would be missing whenever Puerto Ricans sought to take the test.[31] Finally the witnesses sought to defuse the "myth in our State of New York that a citizen can be an intelligent, well-informed voter only if he is literate in English."[32]

New York State refused to retreat and challenged the constitutionality of Section 4(e) all the way to the U.S. Supreme Court. In *Katzenbach v.*

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28. 111 CONG. REC. 11,064 (1965)

29. Mr. Badillo, as noted above, became the first Puerto Rican elected to Congress and represented the Legion of Voters before Congress in 1965. Ms. Vidal Santaella now sits on the bench of the New York County Supreme Court and was the first Puerto Rican woman admitted to the bar of New York State. www.uvm.edu/~culture/site/social_action.html (last visited Feb. 26, 2005). She also represented the Legion of Voters in 1965 before Congress. Mr. Gerena-Valentín was a renowned community activist who organized the massive Puerto Rican mobilization for the Rev. Martin Luther King, Jr.'s Poor People Campaign in 1968. Andrés Torres, *Political Radicalism in the Diaspora – The Puerto Rican Experience*, *in* THE PUERTO RICAN MOVEMENT 5, (Andrés Torres & Jose E. Velázquez eds., 1998). He became a New York City Councilman from the Bronx in the 1970s and was the lead plaintiff in *Gerena-Valentin v. Koch*, No. 81 Civ. 5468 (KTD) (S.D.N.Y. 1983), consolidated with *Herron v. Koch*, 523 F. Supp. 167 (E.D.N.Y. 1981). *See Gerena-Valentin v. Koch*, 554 F. Supp. 1017, 1018-1019 (S.D.N.Y. 1983), one of the earliest and most important cases in New York City regarding injunctive relief under Section 5. In the 1965 testimony he represented the National Association of Puerto Rican Civil Rights.

30. *Voting Rights: Hearings on H.R. 6400 Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 508-517 (1965).

31. *Id.* at 511.

32. *Id.* at 510.

Morgan,[33] the court upheld Section 4(e) as a valid exercise of Congressional authority under the Fourteenth Amendment. In doing so it unequivocally recognized the purpose of Section 4(e) as an exclusive protection for Puerto Rican voters:

> [Section] 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government – both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.[34]

Thus, the 1965 version of the VRA contained powerful limitations on state power embodied in Section 5's coverage of the Deep South, nationwide prohibitions on voting discrimination under Section 2,[35] and discrete protections against discrimination against Puerto Rican voters because of their unique language minority status under Section 4(e). None of the major players at the time would foresee the significance of that isolated provision championed by New York's Senators to the overall development of Section 5 protections in the near future. Indeed, Section 4(e) is often overlooked in the analysis of the VRA's impact on Latino voting strength by various commentators who erroneously conclude that the Act's 1975 amendments expanding Section 5 coverage to Latino citizens in English only electoral systems, and establishing Section 203 bilingual assistance are the Act's first targeted provisions to assist Latino voters.[36]

II. Puerto Ricans and Section 5 of the VRA

Section 4(e) – the Puerto Rican provision of the VRA – provided the means to extend the VRA's strongest protections under Section 5 to New York, and in doing so extended the Act's best tools to the only major metropolis outside of the Deep South. New York was not covered under Section 5's triggering formulae in the 1965 Act because more than 50% of the eligible voters were registered and turned out to vote in the 1964 presidential election, despite the fact that New York clearly employed a "test or device" for voting – its literacy test.[37] In 1970 Congress amended the VRA to include the 1968 presidential election within its formula for Section 5 coverage. By 1971 the U.S. Attorney General determined that New York's literacy test was a "test or device" under the VRA and the Census Bureau certified that Bronx, Kings and New York counties met the threshold crite-

33. 384 U.S. 641 (1966).
34. *Id.* at 652.
35. 42 U.S.C. § 1973 (2000).
36. *See* Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 Tex. L. Rev. 1479 (1993). ("No Latino testified before congressional committees in either 1965 or 1969-1970, and participants in the congressional debates voiced no concern about low Mexican American or Latino voting rates." *Id.* at 1481. Clearly, de la Garza and DeSipio completely missed the 1965 landmark Section 4(e) provision and its legislative history). *See also* Louis DeSipio, *Latino Voters: Lessons Learned and Misunderstood*, *in* The Unfinished Agenda of the Selma-Montgomery Voting Rights March (Black Issues in High Education eds., 2005). *But cf.*, David H. Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 Cath. U. L. Rev. 250, 254 n.26 (1976) (where the author notes that except for Puerto Ricans in New York, there was little consideration given to minority groups in the 1965 VRA, other than blacks).
37. NAACP v. New York, 413 U.S. 345, 357 (1973).

ria regarding registration and turnout. At the end of 1971 New York State filed a declaratory judgment suit to exempt these counties from coverage alleging that its literacy test had not been used in a discriminatory fashion in the preceding ten years, that they took some measures to increase voter registration in the three counties and that the preclearance requirement jeopardized the State's ability to meet its redistricting and election calendar for 1972.[38] In 1972 the federal government agreed to a consent judgment proposed by New York State to allow the exemption from coverage, the District Court entered the judgment and also denied a motion to intervene from the NAACP.[39]

Things would have stood right there but for a handful of federal court decisions in New York under Section 4(e) that underscored how New York's literacy test and English only elections work to discriminate against eligible voters, specifically Puerto Rican voters. Lawyers at the Puerto Rican Legal Defense and Education Fund litigated these cases. In *Lopez v. Dinkins*,[40] Puerto Rican voters used Section 4(e) to secure assistance in Spanish at the polls.[41] Along with Chinese American voters, they were able to negotiate the printing of ballots in Spanish and a panoply of assistance at the polls in both Spanish and Chinese.[42] In *Coalition for Education in District One v. Board of Elections*, the federal court was compelled to overturn a school board election because of the city's failure, *inter alia*, to provide adequate bilingual assistance to Puerto Rican voters.[43] The court found that the Board of Elections caused the late arrival of bilingual materials at the polls, failed to provide written instructions in Spanish, and failed to properly train or instruct interpreters.[44] Citing another Section 4(e) case out of Chicago,[45] the court assessed all of the improprieties and ruled that collectively they could have modified the outcome of the election and thus, overturned it.[46] Both of these cases paved the way for the wholesale provision of bilingual assistance in the case of *Torres v. Sachs*.[47] The court made two important findings. First it established that the city's "English-only election system constitutes a condition on the plaintiffs' right to vote based on their ability to 'read, write, understand, or interpret any matter in the English language' as presently proscribed by Section 4(e) *and* the 1970 Voting Rights Amendment."[48] This conclusion effectively supported the construction that English only elections were a "test or device" under the VRA – a critical legal interpretation at the time. Secondly, the court concluded that the right to vote requires meaningful access: "Plaintiffs cannot cast an effective vote without being able to comprehend fully

38. *Id.* at 358, 358 n.10.
39. New York v. United States, 65 F.R.D. 10, 11 (D.D.C. 1974).
40. No. 73 Civ. 695 (S.D.N.Y. Feb. 14, 1973).
41. *See* Torres v. Sachs, 381 F. Supp. 309, 312-313 (S.D.N.Y. 1974).
42. *See* Coalition for Educ. in Dist. One v. Bd. of Elections, 370 F. Supp. 42, 44-45 (S.D.N.Y. 1974).
43. *Id.*
44. *Id.* at 50, 52-53.
45. Puerto Rican Org. for Political Action v. Kusper, 490 F.2d 575 (7th Cir. 1973).
46. *Coalition for Education in District One*, 370 F. Supp. at 57-58.
47. 381 F. Supp. 309 (S.D.N.Y. 1974).
48. *Id.* at 312 (emphasis added).

the registration and election forms and the ballot itself."[49] On this point the court also relied on *Garza v. Smith*,[50] and indirectly tied the experience of Mexican American voters in the English only election systems of Texas with the Puerto Rican voters in New York – as noted below this connection was critical for the 1975 amendments that brought language minorities into the coverage formula for Section 5.

As a result of the *Torres* decision, the United States sought to reopen the declaratory judgment issued in New York's favor. And the court, relying exclusively on the *Torres* decision, agreed.[51] Ultimately, the District Court for the District of Columbia rescinded the consent judgment, denied New York's motion for summary judgment and allowed the original certifications by the U.S. Attorney General and the Census Bureau to stand.

Section 4(e) of the VRA – the Puerto Rican amendment – and the litigation that it engendered thus became the foundation for Section 5 coverage in New York City that would apply the Act's strongest provisions to protect, first, African American and Puerto Rican voters, and subsequently all Latino and Asian voters in the City.

In a broader context the benefits gained from Section 4(e) litigation reached all language minority voters throughout the country[52] as it demonstrated the viability of creating comprehensive, bilingual alternatives to English-only electoral systems, and on a large scale. With over 668,000 Puerto Ricans in New York City in 1960 and close to 812,000 in 1970, the electoral reforms generated by Section 4(e) litigation inured to the benefit of hundreds thousands of other Latinos in the city alone.[53] *Torres v. Sachs* and the other Section 4(e) cases outside of New York City[54] created the template for full bilingual assistance above and beyond voter registration to reach language access to the ballots, and access to bilingual assistance at the polls. By the time the 1975 amendments to the VRA were enacted, Puerto Rican voters were enjoying increased access to the political process through these alternative systems. These electoral reforms, forged by the continuous struggle of Puerto Rican activists and lawyers going back to the 1950s with *Camacho v. Doe*, justified the full expansion of bilingual voting

49. *Id.*

50. *Sachs*, 381 F. Supp. at 312, n.5 (citing Gazra v. Smith, 320 F. Supp. 131 (W.D. Tex. 1970)).

51. New York v. United States, 65 F.R.D. 10, 12 (D.D.C. 1974).

52. For a discussion on how Section 4(e) interacts with other official policies of the United States in its treatment of Puerto Ricans who seek to enjoy the full rights of U.S. citizenship in the area of voting, different from their counterparts in other Latino communities, *see* LIZETTE CANTRES, GABE KAIMOWITZ & JUAN CARTAGENA, *Historical and Legal Issues Confronting the Puerto Rican Voter in the Continental United States*, *in* STRATEGIES FOR INCREASING VOTER PARTICIPATION IN PUERTO RICAN COMMUNITIES IN THE CONTINENTAL UNITED STATES, (National Puerto Rican Coalition ed., 1983) (on file with author).

53. In 1960 a total of 757,231 Latinos lived in New York City, over 80% of which were Puerto Rican; in 1970 a total of 1,202,281 Latinos lived in the City, two-thirds of which were Puerto Rican. Gabriel Haslip-Viera, *The Evolution of the Latino Community in New York City: Early Nineteenth Century to the Present*, *in* LATINOS IN NEW YORK: COMMUNITIES IN TRANSITION 14-15 (Gabriel Haslip-Viera & Sherrie L. Baver eds., 1996).

54. In Chicago: *Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575 (7th Cir. 1973); in New Jersey: *Marquez v. Falcey*, No. 1447-73 (D.N.J. Oct. 9, 1973); in Philadelphia: *Arroyo v. Tucker*, 372 F. Supp. 764 (E.D. Pa. 1974); in New York State: *Ortiz v. New York Bd. of Elections*, No. 74-455 (W.D.N.Y., July 10, 1975).

assistance to all language minorities in the 1975 VRA amendments that created Section 203, in the view of the House Committee on the Judiciary:

> There is no question but that bilingual election materials would facilitate voting on the part of langauge (sic) minority citizens and would at last bring them into the electoral process on an equal footing with other citizens. *The provision of bilingual materials is certainly not a radical step. . .* Courts in New York have ordered complete bilingual election assistance, from dissemination of registration information through bilingual media to use of bilingual election inspectors.[55]

But more importantly for the purposes of this essay, Section 4(e) and the litigation it generated established the legal foundation to extend Section 5's coverage to language minority citizens in all Section 5 jurisdictions. In 1975 the principal voting rights advocates that urged Congress to amend Section 5 to incorporate protections for Latino voters were Mexican American lawyers and activists.[56] The Mexican American Legal Defense and Education Fund was instrumental in providing the legal analysis for extending Section 5's coverage to language minority citizens who faced electoral obstacles in English only systems.[57] Vilma Martínez, President and General Counsel at MALDEF, testified[58] that the best way to secure coverage under Section 5 for Mexican American voters, especially, but not exclusively, in Texas, was to enact an additional coverage formula that would include: a) at least five percent of the jurisdiction must be persons of Spanish language or surname; b) less than 50% of the persons of voting age in that jurisdiction voted in the 1964 or 1968 presidential election and c) that the Attorney General would determine that the jurisdiction conducted elections and registration activities only in the English language during those presidential elections.[59] Congress eventually modified[60] this proposal in the final version of the 1975 amendments but kept true to the MALDEF proposal that the provision of elections conducted only in English would be part of the triggering formula. MALDEF made the case convincingly that English only elections should be considered a "test or device" that prevented citizens from voting. And it did this on the strength of the federal court decisions that interpreted Section 4(e) throughout the Northeast and Midwest. Thus, MALDEF argued, "federal courts have held that where Spanish-speaking Americans reside, the conducting of an election only in the English language is a 'device' which abridges or denies

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55. H.R. REP. NO. 94-196, at 24-25 (1975).

56. de la Garza & DeSipio, *supra* note 36, at 1482.

57. *See Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247 and H.R. 3501 Before the House Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong. 800, 853 (1975) [hereinafter *1975 House Hearings*]; *Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 Before the Senate Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong. 756 (1975) [hereinafter *1975 Senate Hearings*].

58. Ms. Martínez's testimony was presented jointly with Al Perez, Associate Counsel at MALDEF and Tom Reston of the law firm of Hogan and Hartson. *1975 House Hearings, supra* note 57, at 853.

59. *1975 House Hearings, supra* note 57, at 857-58.

60. The final criteria required a) more than 5% of citizens of voting age had to be members of a single language minority group; b) fewer than 50% of the voting age citizens in the jurisdiction voted in the 1972 presidential election; and c) that election was conducted only in English. *See* 42 U.S.C. §§ 1973b(f)(3), 1973b(b) (2000).

the right to vote of such citizens."[61] MALDEF also brought to Congress's attention the position of the U.S. Attorney General and the Solicitor General that adopted the same view of "test or device" in the litigation that recaptured New York's three counties for Section 5 coverage. In the briefs filed by the Solicitor General in *New York State on Behalf of New York, Bronx and Kings Counties v. United States*, the federal government took the position that "[t]he printing, distribution, and use of election materials solely in the English language and the failure adequately to provide bilingual materials constitute a 'test or device' within the meaning of Section 4 (c)."[62] In short, the construction of Section 5's coverage formula to capture English only election systems was won by relying upon the only Section 5 jurisdiction at the time that contained language minority voters that used the courts to assert their voting rights: Puerto Ricans in New York City. The ability of the Mexican American advocates[63] before Congress in 1975 to join the experiences of both Mexican Americans and Puerto Rican voters towards the goal of expanding the VRA was also exemplified by the connections between two cases: *Torres v. Sachs* and *Garza v. Smith*.[64] The latter highlights the extensive discrimination faced by Mexican American voters in Texas, which merits separate discussion.

III. Mexican Americans and Section 5 of the VRA

Mexican American voters are also specific beneficiaries of the protections of Section 5 and Section 203, and played the leading role in securing favorable amendments to the VRA in 1975. Especially throughout the Southwest, the use of numerous discriminatory practices to stem the rising tide of Mexican American political activism took on forms closer to the *de jure* discrimination that confronted the nation's African American population than the discrimination that confronted Puerto Ricans in the Northeast and Midwest. The VRA finally addressed this inequity through its amendments beginning in 1970 which identified two counties outside of New York

61. *1975 House Hearings*, *supra* note 57, at 864-65 (citing *Arroyo*, *Torres*, and *Puerto Rican Org. for Political Action*); *id.* at 869 (citing *New York v. United States*); *id.* at 875 (citing *Torres*); *1975 Senate Hearings*, *supra* note 57, at 761 (citing *Torres*).

62. *1975 House Hearings*, *supra* note 57, at 873. Robert Bork, Solicitor General, submitted the United States brief.

63. In 1975 testimony from Puerto Rican organizations was much more limited than in 1965 and failed to fully make the connections between successful efforts to overcome discrimination against Puerto Rican voters in the intervening ten years and the need to continue and expand the VRA. Only two Puerto Ricans testified in Congress in favor of the 1975 VRA amendments. Congressman Herman Badillo, who sat on the House Subcommittee on Civil & Constitutional Rights that received the VRA testimony in 1975, supported the VRA's expansion for language minority voters and recounted briefly how Congress had received "substantial documentary evidence of pervasive discrimination in voting with respect to persons of Spanish heritage." *1975 Senate Hearings*, *supra* note 57, at 232. Jack John Olivero, Chair of the Board and Acting Executive Director of the Puerto Rican Legal Defense and Education Fund, testified generally about the numerous court orders PRLDEF was able to secure through Section 4(e) litigation to assist Puerto Rican voters, argued in favor of continuing the ban on literacy tests, and noted how more work needed to be done to protect Puerto Rican voters in the U.S. outside of New York. *1975 House Hearings*, *supra* note 57, at 598-604. Neither witness supplemented their views with any data and the PRLDEF testimony only supported the new interpretation of "test or device" with anecdotal evidence.

64. *1975 Senate Hearings*, *supra* note 57, at 761-63; *1975 House Hearings*, *supra* note 57, at 875.

with substantial Latino populations, one in Arizona and one in California, for Section Five coverage.[65] The Act's protections for Mexican American voters addressed a racialized inequity that was purposefully directed at them that turned on their racial/ethnic characteristics and not only on their language minority status. The Act's treatment of the State of Texas is a prime example.[66]

Mexican Americans in Texas faced numerous obstacles to the exercise of their full citizenship rights emanating from full scale, *de jure* discrimination for decades, leading to the passage of the VRA.[67] A recent expert report on the history of discrimination against Mexican Americans in Texas by historian Andrés Tijerina[68] paints a vivid, painful account of the entrenched, government-sponsored reign of terror and exclusion of Mexican Americans from Texas' political spheres that included vigilante mobs, poll taxes, white primaries, intimidation at the polls and denial of interpreters. The government-sponsored vigilante raids to drive away Mexican Americans from large land grants in South Texas[69] were harbingers of the state government's raids used to stop Mexican American voters in the 20th century: "The Texas Rangers had traditionally intimidated Mexican Americans, and were used specifically to discourage their voting after 1900."[70] In 1918 Governor William Hobby established a special "Loyalty Ranger Force" of 1,000 men to supplement the work of the Texas Rangers. These armed vigilantes intimidated and "investigated" Mexican American voters in Corpus Christi, Duval County, Nueces County and other places.[71] The violent and racist reputation of the Texas Rangers was cemented by their acts of terror that included lynchings, burning houses, executions in front of family members and murder.[72] Anglos in other parts of Texas were emboldened by these events and proceeded to directly stop Mexican Americans at the ballot box, including the 3,000 plus Anglos in Weslaco in 1928 who, with shotguns in hand, yelled "Don't let those Mexicans in to vote."[73] As Professor Tijerina concluded: "Years later, scholars and organization

65. de la Garza & DeSipio, *supra* note 36, at 1481 n. 13.

66. Space limitations make it impossible to outline the extensive discrimination suffered by Latino voters in Section 5 jurisdictions in California, Arizona or Florida, or in places outside of Section 5 coverage like the Midwest.

67. *See* GUINIER & TORRES, *supra* note 15, at 229-32; S. REP. NO. 94-295, *supra* note 20, at 25, *reprinted in* 1975 U.S.C.C.A.N. 774, 791 ("Evidence before the Subcommittee documented that Texas also has a long history of discriminating against members of both minority groups [Mexican Americans and blacks] in ways similar to the myriad forms of discrimination practiced, against blacks in the South."); Symposium, *Drawing Lines in the Sand: The Texas Latino Community and Redistricting 2001*, 6 TEX. HISP. J.L. & POL'Y 1, 7-8 (2001) [hereinafter Symposium, *Drawing Lines*] (statement of Henry Flores).

68. Professor of History at Austin Community College. Expert Report of Dr. Andrés Tijerina, Balderas v. Texas, No. 6:01CV158 (E.D. Tex. Nov. 28, 2001) [hereinafter Tijerina Expert Report] (on file with author).

69. The 1874 Peñascal Raid aimed at taking land south of Corpus Christi was especially vicious. *Id.* at 4. Every adult, male Mexican American in a community of 500 people was murdered by masked, white vigilantes whose leaders were first deputized in Brownsville. *Id.*

70. *Id.* at 7.

71. *Id.*

72. *Id.*

73. *Id.* at 8.

leaders would blame these widespread events for a disaffected Mexican American electorate."[74]

While Texas never imposed a literacy test for voting[75] or any other prerequisite that would fit into the definition of "test or device" to trigger Section 5 coverage,[76] it surely used multiple mechanisms to stop Mexican American and black voting strength. The racially exclusive "white primary" was just one example. It was used as early as 1902 in Gonzales County[77] and applauded in Dimmit County in 1914 especially because it "absolutely eliminates the Mexican voter as a factor in nominating county candidates."[78] It took multiple lawsuits to finally outlaw Texas' white primaries.[79] The imposition of a poll tax under the Texas state constitution was another measure aimed at limiting the vote of poor, black and Mexican American voters,[80] and again it took court action, this time brought on behalf of black voters, to eliminate the tax.[81] Texas then replaced the poll tax with what was considered to be to most restrictive voter registration system in the county,[82] requiring annual voter registration months in advance of Election Day. In ruling upon the effect of the history of voting related discrimination in Texas, one District Court found that:

> This cultural and language impediment, conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican American access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.[83]

In a related area of civic life, Texas was the site of a pervasive pattern of exclusion from jury service for Mexican American residents. In 1954, in *Hernandez v. Texas*,[84] in the same term as *Brown v. Board of Education*, the U.S. Supreme Court, for the first time, held that the Fourteenth Amendment's Equal Protection Clause prohibited unlawful discrimination against persons of Mexican descent. Rejecting Texas's position that the Equal Protection Clause only covers discrimination based on a two-class theory "that is based on the differences between 'white' and 'Negro,'"[85] the Court ruled that the failure to have even one Mexican American serve on a jury in Jackson County among the six thousands jurors called in twenty five years was proof of a constitutional violation.[86]

74. *Id.*

75. Robert Brischetto et al., *Texas*, *in* QUIET REVOLUTION IN THE SOUTH 239 (Chandler Davidson & Bernard Grofman eds., 1994).

76. This may have been by design. Symposium, *Drawing Lines*, *supra* note 67, at 40 (statement of Rolando Rios) (noting that President Lyndon Johnson obtained support for the VRA by promising Texan legislators that the Act would not affect Texas).

77. Brischetto et al., *supra* note 75, at 237.

78. Tijerina Expert Report, *supra* note 68, at 7.

79. Nixon v. Herndon, 273 U.S. 536 (1927); Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953).

80. In 1903 it was assumed that Mexican Americans would be either too poor or too forgetful to pay the poll tax. Tijerina Expert Report, *supra* note 68, at 7.

81. United States v. Texas, 252 F. Supp. 234 (W.D. Tex. 1966), *aff'd*, 384 U.S. 155 (1966).

82. S. REP. NO. 94-295, *supra* note 20, at 25, *reprinted in* 1975 U.S.C.C.A.N. 774, 791.

83. Graves v. Barnes, 343 F. Supp. 704, 731 (W.D. Tex. 1972).

84. 347 U.S. 475 (1954).

85. *Id.* at 478.

86. For a reference to Gus García, the attorney who litigated this historic case, see Symposium, *Drawing Lines*, *supra* note 67, at 5 (statement of Henry Flores).

Discrimination against Mexican American voters because of their language minority status was also commonplace. The Texas state legislature passed a bill to prohibit interpreters at the polls in 1918. "This law was clearly aimed at voters who had difficulty in English – a lack of proficiency that was undoubtedly encouraged by discrimination in the schools, including widespread segregation of Tejanos."[87] And in *Garza v. Smith*,[88] Mexican American voters challenged laws which prohibited their receiving assistance in casting their ballots, even if they were illiterate in English, because only the physically disabled were entitled to that assistance. The court ruled in favor of all illiterate voters in Texas, but as noted by the MALDEF in its subsequent testimony in favor of the 1975 VRA amendments, *Garza v. Smith* was brought specifically to address the need of English illiterate voters.[89] Thus, while the relief obtained in *Garza v. Smith* for Spanish-speaking voters was not as comprehensive as that in *Torres v. Sachs*, both cases were important milestones in overcoming English only election structures in their respective states. And both were touted as proof of the necessity to expand VRA protections in 1975:

> Accordingly, *Garza* in Texas is as compelling a reason as *Torres* in New York for the Attorney General to find that the English-language elections in Texas are in fact a "test or device" for purposes of triggering Section 5.[90]

Incredibly, even with a showing of pervasive, long-term, purposeful discrimination in Texas, admittedly much more extensive than that suffered by Puerto Rican voters in New York, Mexican Americans testifying before Congress still had to overcome questions about how they should still qualify for coverage just because Puerto Ricans obtained coverage in New York.[91] Fortunately for all Latinos nationwide, they did.[92]

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87. Brischetto et al., *supra* note 75, at 237.

88. 320 F.Supp. 131 (W.D. Tex. 1970).

89. *1975 House Hearings*, *supra* note 57, at 875 (where the witnesses noted how the plaintiffs in *Garza* represented a class of 300,000 Mexican Americans who were illiterate and how the court found that the state never enforced other guarantees to provide them assistance in Spanish, where needed).

90. *Id.* *See* Brischetto et al., *supra* note 75, at 242 ("The argument in *Garza* foreshadowed the broadening of Section 5 coverage to Texas five years later.").

91. The testimony noted above about the connections between *Torres* and *Garza* referred to correspondence between Tom Reston (on behalf of MALDEF) and James Turner, Deputy Assistant Attorney General where the latter questioned whether Texas, unlike New York, could be covered since there was allegedly "no judicial determination that the English-language election [in Texas] discriminated against Spanish-speaking voters." *1975 House Hearings*, *supra* note 57, at 875. Similarly, Vilma Martínez of MALDEF was asked repeatedly to make the case again for coverage of Mexican American voters who attended schools in the U.S. just because Puerto Rican voters, who attended schools in Puerto Rico, obtained coverage. She responded: "I do not feel I have to be that defensive about where I am coming from. I think that we have made a compelling case, compelling enough to justify expansion . . . to cover Mexican Americans. I think that an undue focus on language, or English only elections, does not begin to meet the understanding of the problem we are talking about here." *1975 Senate Hearings*, *supra* note 57, at 762. For a contrary view on how Congress mistakenly extended the "extraordinary protection of section 5 to ethnic groups without the extraordinary history of southern blacks," see Abigail Thernstrom, *More Notes from a Political Thicket*, 44 EMORY L.J. 911, 921 (1995). A description of how pervasive discrimination against Mexican Americans continued in Texas after 1975 and leading up to the 1982 VRA extension of Section 5 is contained in the congressional testimony of Joaquín Ávila (former President & General Counsel of MALDEF) summarized in Víctor Andrés Rodríguez, *Comment: Section 5 of the Voting Rights Act of 1965 After* Boerne*: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 808 n.227 (2003).

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By the time of the 1975 VRA amendments, Mexican Americans in Texas had made some inroads into asserting political power at the polls even in the face of such engrained discrimination, but were still suffering from systemic exclusion. In the first two decades of the 20th century, J.T. Canales served in the Texas legislature and led an investigation into the acts of the Texas Rangers.[93] The 1948 election of Gustavo García to the San Antonio school board was a "watershed event" and the 1957 election of Raymond Telles as Mayor of El Paso marked the first time any Latino won such an office of a major Southwestern city in the 20th century.[94] Indeed, by the 1960s "Tejanos" began to "come into their own as a statewide political force, although they had been emerging as an important part of the Texas liberal coalition at least since the 1950s." The activism in the Southwest among Mexican Americans, including the Chicano protest movements of the 1960s[95] and 1970s[96] set the context for the full use of various forms of pressure upon the Texas power structure, including lobbying and litigation. It has been reported, for example, that between 1974 and 1988 in Texas alone, MALDEF and Southwest Voter Registration Education Project (the premier model of an effective, grass-roots political mobilization organization in the Latino community) filed 88 voting rights suits.[97]

IV. Where's the Ñ in Today's Reauthorization Debate?[98]

As noted above, Section 5 of the VRA has protected the voting rights of Latino voters for 40 years in multiple venues and in multiple forms. It represents Congress' solution to the historical exclusion of Latino communities from American political spheres that was packaged expertly for Congressional consideration in 1965 and in 1975. And it is a history of exclusion that still reverberates today in many Latino communities. Yet the current debate over the VRA's viability, indeed even its utility, has rendered this history invisible. The national discourse over the fate of majority minority districts that began in earnest with the Supreme Court's decision in *Shaw v. Reno*,[99] and continues in *Georgia v. Ashcroft*,[100] has benefited to some degree by concerns over its consequences for Latinos[101]

92. Texas' last gasp, in this respect, was to challenge its coverage under Section 5 in Briscoe v. Levi, 535 F.2d 1259 (1976). It lost.

93. de la Garza & DeSipio, *supra* note 36, at 1495.

94. Brischetto et al., *supra* note 75, at 242.

95. *See* David H. Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 Cath. U. L. Rev. 250, 254-55 (1976).

96. *See* DeSipio, *supra* note 36, at 135-36.

97. Brischetto et al., *supra* note 75, at 242. *See* Symposium, *Drawing Lines*, *supra* note 67, at 41 (statement of Rolando Rios) (noting that cumulatively through this decade, Southwest Voter Registration Education Project, founded by William C. Velásquez, filed close to 240 voting suits).

98. Just like the Spanish alphabet character "Ñ" is missing from the keyboards of today's Internet because of the dominance of English in cyberspace, so to is a Latino accent in the current debate over the VRA reauthorization.

99. 509 U.S. 630 (1993).

100. 539 U.S. 461 (2003).

101. For a discussion of how the attack on majority minority districts affects Latino voting power in New York, see Angelo Falcón, *Time to Rethink the Voting Rights Act?*, 23 Soc. Pol'y 17 (1992); Angelo Falcón, *The End of Voting Rights?*, Hispanic, Nov. 1997, at 68; Juan Cartagena, *Puerto Ricans and the Unraveling of the Voting Rights Act*, Crítica: A Journal of Puerto

but those lessons are still unincorporated in the reauthorization debate to date.

Latino voters, like other protected minorities under the VRA, often face a polemic regarding race/ethnicity and political representation: the tension between having Latinos directly represent Latinos in a legislative body versus the ability and willingness of non-Latinos to adequately represent Latino interests. Much of this turns on what political scientists call descriptive versus substantive representation.[102] Descriptive representation is achieved when the representative comes from the same social or demographic group that she represents in an elected body. Substantive representation is obtained when representatives get results consistent with, and responsive to, the political needs of their constituents, regardless of the representative's race, ethnic or social background. In *Georgia v. Ashcroft,* Justice O'Connor elaborated upon the perceived advantages and disadvantages of both descriptive and substantive representation strategies as means to create fair voting systems. Descriptive representation would result in the creation of safe minority districts, that is, districts with high minority concentrations, in order to maximize the electoral success of the minority group. Such districts would result in "more 'descriptive representation' because the representatives of choice are more likely to mirror the race of the majority of voters in the district, [however] the representation may be limited to fewer areas."[103] Conversely, distributing minority voters throughout more "influence" districts presumably increases the opportunities for minorities to elect candidates of choice. And while Justice O'Connor acknowledges that influence districts run the risk that the minority group's preferred candidates may lose "[s]uch a strategy has the potential to increase 'substantive representation' in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group."[104]

The question for Latinos nationally is whether at this point of their political development, they must be descriptively represented in their respective legislatures in order to be fairly represented. In other words, there are few places like Bronx County, New York or Dade County, Florida where Latino voting strength is mirrored in the halls of their local legislative bodies. When compared to the inroads made by African American

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RICAN POLICY & POLITICS, July 1995; *Distrito de Nydia en Manos de un Tejano*, EL DIARIO – LA PRENSA, May 11, 1996; *End of Puerto Rican Voting Rights? The Life and Death of New York's 12th CD*, CRÍTICA: A JOURNAL OF PUERTO RICAN POLICY & POLITICS, Mar.–Apr. 1997. For a discussion of how the attack on majority minority districts affects Latino voting power in Texas, see Symposium, *Drawing Lines*, *supra* note 67, at 10-12 (statement of Henry Flores); *Id.* at 51 (statement of Nina Perales). For a discussion of how Latino influence districts work in California, *see*, Estrada, *supra* note 17, at 1293-94. For a discussion about the descriptive and substantive representation issues within minority districts in New Jersey's Latino community, see Juan Cartagena, *New Jersey's Multi-member Legislative Districts and Latino Political Power*, RUTGERS RACE & L. REV. (forthcoming 2005). For a discussion that questions the need for majority Latino districts in particular and their relationship to overall Latino electoral participation, see de la Garza & DeSipio, *supra* note 36, at 1514-27; Rudolfo de la Garza, *Latino Politics*, 7 ANN. REV. POL. SCI. 91, 115-16 (2004).

102. HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 60-111 (1967).

103. *Georgia v. Ashcroft*, 539 U.S. at 481.

104. *Id.*

elected officials, Latinos fail to reach parity in many jurisdictions.[105] While Latinos share many attributes, opportunities and lessons with African Americans in over 40 years of Section 5 protection, the debate must still account for them separately in order to address their unique needs today. The debate, however, fails to do this in almost every instance to date.

For example, a recent magazine article by Jeffrey Toobin repeated what is being whispered in the Capitol: "Is the Voting Rights Act obsolete?"[106] Similarly, Henry Louis Gates, Jr. echoed these points by noting that the previous salutary effects of the VRA may have waned.[107] Neither of them addressed what this all portends for the growing Latino population in the country. In parallel fashion, a small number of scholarly articles have addressed the ramifications of the new Supreme Court standards for Section 5 that allow states to demonstrate compliance through a choice of strong majority minority districts or a number of "influence" districts where the minority group can exert more influence through partisan politics.[108] And yet since the articles all focus on the *Georgia v. Ashcroft* litigation, they fail to address the ramifications of this new paradigm on Latino voting strength. Thus, "minority" districts, majority, influence or otherwise, read black in this limited discourse.

The one exception here is Bernard Grofman, in his insightful, personal critique of the new trend by the Supreme Court for new Section 5 standards in the *Georgia v. Ashcroft* case.[109] In Professor Grofman's view the future does not bode well for Latino voting strength:

> In Congress, and in state legislatures, most of the black majority (or near majority) districts that could have been created are already in place, and blacks are a declining proportion of the total electorate (except in a handful of states) so we should not expect to see new black majority seats created. For Hispanics (the fastest growing minority in the U.S.) in covered jurisdictions, such as Texas, that is not true. *A legal climate that discourages the creation of new majority-minority districts will have its greatest impact on Hispanic representation.*[110]

Grofman's observations turn mainly on demographics: the reality that Latino population booms are not likely to dissipate soon. But they also are justified by the (still unfulfilled) state of Latino representation today.

The issue of descriptive versus substantive representation had a surprising twist at the beginning of this decade, on the eve of the decennial

105. At the national congressional level Latino representation should increase as they are significantly underrepresented compared to African Americans, will still remain segregated for the most part, and will continue to grow in numbers and voters. Estrada, *supra* note 17, at 1291, 1286.

106. Jeffrey Toobin, *Poll Position: Is the Justice Department Poised to Stop Voter Fraud – or Keep Voters From Voting?*, THE NEW YORKER, Sept. 20, 2004, at 56.

107. Henry Henry Louis Gates, Jr., *When Candidates Pick Voters*, THE NEW YORK TIMES, Sept. 23, 2004, at A27.

108. Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21 (2004); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success?*, 104 COLUM. L. REV. 1710 (2004); Meghann E. Donahue, Note, *The Reports of My Death Are Greatly Exaggerated: Administering Section 5 of the Voting Rights Act after* Georgia v. Ashcroft, 104 COLUM. L. REV. 1651 (2004).

109. Bernard Grofman, *A Citizen's Dissent: Potential Long-Term Problems with the Approach to Section 5 taken in* Georgia v. Ashcroft (May 25, 2004) (unpublished manuscript, on file with the Columbia Law Review).

110. *Id.* at 6 n.13 (emphasis added).

wave of redistricting battles. It came in the form of a partisan decision by the Congressional Hispanic Caucus. Two news reports recounted an internal agreement among the Hispanic Caucus members, all Democrats, that they would not support Latino challengers to Democrat incumbents in primary contests.[111] The same news accounts questioned how this new position squared with the Caucus' goal of increasing Latino representation in Congress, and how the position was the product of a larger Democratic Party strategy focusing on controlling the House and, presumably where possible, state legislatures. Is it possible that the Caucus members who supported this strategic decision also view the VRA as having accomplished its goals regarding Latino representation? To the extent that Caucus members exhibited nothing more than self-preservation when they adopted a position that closes the door on newcomers, are they not acting like every other incumbent regardless of race?[112] And if Latinos expect more of them, are they holding them to a higher standard?[113]

The principles inherent in the Hispanic Caucus's position were applied in very practical terms by three episodes in the redistricting battles this decade: *Georgia v. Ashcroft*, regarding state and congressional redistricting in a Section 5 jurisdiction where African American Democrats championed a plan that would create more influence districts and less majority black districts; *Page v. Bartels*,[114] a New Jersey state legislative redistricting challenge under Section 2 of the VRA where black and Latino Democrats supported a similar strategy for the State Assembly and State Senate; and *Cano v. Davis*,[115] where Latino Democrats insisted on congressional and state senate districts in Southern California that reduced the percentages of Latino voters. In the context of today's debate over Section 5 reauthorization the Georgia and New Jersey cases have been joined to demonstrate how African American communities can make political deals towards substantive representation goals.[116]

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111. Ethan Wallison & John Mercurio, *Caucus' Move Could Limit Hispanic Gains, Challengers Unhappy with Decision*, ROLL CALL, Apr. 23, 2001 ("In a decision that could undercut efforts to boost their numbers on Capitol Hill, Congressional Hispanics have privately agreed to back incumbent Democrats in primary contests with Hispanic challengers, despite major population gains that portend new electoral clout for Latinos."); Ruben Navarrette, *Partisanship Powers Hispanic Caucus, Congressional Group Turns on Judicial Candidate*, THE DALLAS MORNING NEWS, Sept. 27, 2002, at 23A.

112. Donahue, *supra* note 108, at 1670 ("Minority representatives not only cannot be charged with the responsibility to know the statistical voting patterns of their district, but also cannot be assumed to have only minority voter's interests in mind when voicing support for a plan.").

113. In California similar questions have been asked of the position taken by voting rights advocates in this decade's congressional redistricting. "MALDEF appears to have asked something more of the Latina/o politicians involved in the redistricting than that of Anglo politicians – to ensure full and few (sic) representation of the Latina/o community." Kevin R. Johnson, *Latinas/os and the Political Process: The Need for Critical Inquiry*, 81 OR. L. REV. 917, 925 (2002).

114. Page v. Bartels, 144 F. Supp. 2d 346 (D.N.J. 2001).

115. 211 F. Supp. 1208 (C.D. Cal. 2002),

116. Samuel Issacharoff links the two cases in his essay on the viability of the VRA, stating, in effect, that blacks in Georgia under Section 5 should have the same flexibility to wheel and deal in the political arena as blacks in New Jersey under Section 2, without worrying about strict nonretrogression compliance under Section 5: "[T]here appears to be little reason to believe that the law should continue to treat blacks in Georgia distinctly from blacks in New Jersey." Issacharoff, *supra* note 108, at 1728).

While *Georgia v. Ashcroft* has garnered considerable attention because of its place in the Supreme Court's Section 5 jurisprudence, its location in the Deep South and the history that this fact brings to bear, and because, I would submit, its black/white racial dynamics are easier to assess than the complicated, multi-racial society that we have now become, a post-mortem analysis of how blacks fared in Georgia and how blacks and Latinos fared in New Jersey after *Page v. Bartels* would be useful in the upcoming reauthorization battles. Suffice it to say that the preliminary evaluation of the Georgia aftermath is not all positive. For example, the Democratic delegation in Georgia's capitol, which presumably was even further consolidated with the influence district modality championed by black Democrats, suffered a major defeat when four Democrats switched and joined the Republican party.[117] In New Jersey preliminary assessments indicate that blacks fared no better[118] and that Latinos failed to gain any inroads whatsoever from linking their fate to the Democratic Party's 2000 redistricting strategy. It is hard to fathom what benefits if any Latinos in New Jersey can now identify as they joined forces with their black counterparts and enthusiastically endorsed the Democrat's redistricting plan. As the state's largest minority group (13.3% of the population, 12.3% of the voting age population) New Jersey has no Latino State Senator among the forty Senators in Trenton, since (now Congressman) Robert Menendez was the first and only Latino to break that glass ceiling thirteen years ago; Latinos in the State Assembly presently number six out of 80; and in Hudson County, by far the heaviest Latino area of the state (57% Latino), the county's delegation to Trenton has whites over-represented to the tune of eight out of nine seats.[119] Since the *Page v. Bartels* decision, Latinos can point to only two accomplishments: Albio Sires (the only Latino elected official from Hudson County) is Speaker of the Assembly, and Roberto Rodríguez was appointed to the New Jersey Supreme Court (after a previous Latina candidate was first nominated, then, after pressure from African

117. Karlan, *supra* note 108 at 29. Whatever significant gains were to follow the influence district strategy in Georgia have yet to materialize as per the assessment of Debo Adegbile, a voting rights attorney with the NAACP Legal Defense Fund. Interview with Debo Adegbile, Attorney, NAACP Legal Defense Fund (Feb. 18, 2005).

118. While more research is warranted, blacks have little to show for endorsing a strategy that reduced the number of safe black districts in the opinion of Walter Fields, a witness against the Democrats plan in *Page v. Bartels* and the publisher of a website on African American contemporary issues (thenorthstarnetwork.com). Interview with Walter Fields, Publisher, thenorthstarnetwork.com (Feb. 16, 2005). One additional African American Senator, Ms. Nia Gil, was elected but it was the product of the decision to slate her on the Senate line since New Jersey's state legislative districts are multi-member districts and she won in her old Assembly district; and one additional black Assemblyman was elected out of Orange. Since *Page v. Bartels* was decided, however, blacks have made no gains in the traditionally more powerful positions and have actually lost ground in appointments in Trenton. Thus, Senator Gil's hopes to gain a leadership position in the Senate were dashed by then Senator (and now Acting Governor) Richard Cody; blacks who hoped to get a least the position of Speaker of the Assembly in the McGreevey Democratic administration saw that position given instead to Albio Sires (who just two years prior ran for office as a Republican); black appointees William Whatley and Gwendolyn Long were eased out of executive positions with no real plan for additional African American appointments; blacks were not even remotely considered viable in the race to replace Governor McGreevey when he resigned; and the last African American to run for statewide office in the Garden State was Ken Gibson in the 1980s.

119. Cartagena, *New Jersey's Multi-member Legislative Districts and Latino Political Power*, *supra* note 101.

American legislators, unnecessarily vilified by the McGreevey administration).[120]

Of course a similar post-mortem assessment is warranted in California, where the *Cano v. Davis* litigation highlighted major divisions[121] between traditional advocates like MALDEF and the very Latino elected officials that benefited from the fruit of MALDEF's labors. In many ways the issues raised in the California litigation for Latino political power, even in a non-Section 5 context, mirror those in Georgia. The court in *Cano v. Davis*, which addressed both VRA Section 2 claims and intentional discrimination claims, laid particular emphasis on the success of Latino political aspirations in the state: "California's political system is far from closed to Latinos."[122] In ruling that the challenges to the two districts at issue failed to meet the standards under Section 2 because significant numbers of Latino and Latino-preferred candidates received substantial white cross-over votes,[123] the court addressed an issue that goes to the core of the Congressional Hispanic Caucus position described above: Plaintiffs charged defendants with deliberately limiting the number of Latinos in the contested districts "in order to render the incumbents in these districts less susceptible to primary challenges from Latino candidates."[124] Once again the Democratic Party strategy of fortifying the fortress and fencing out new Latino voices won the day as the court left the California districts intact by recognizing that redistricting requires balancing a complex set of factors, including "advancing partisan interests."[125] Without engaging in a discussion over descriptive or substantive representation, the court in California, like the court in New Jersey in *Page v. Bartels*, recognized the value in Latinos opting for districts in which they could maintain influence through coalition building with other ethnic and racial groups. But as noted above, quite unlike New Jersey, in California Latinos had achieved a large measure of political representation.[126]

In the face of the emerging trends of increasing Latino political representation, we thus have the judiciary embarking upon a new course of Latino influence districts to allow for a new paradigm of political negotiation. The courts, along with Democratic elected officials, have said that African Americans were at the table in Georgia and played at a higher level, and that, similarly, Latinos were at the table in California and played the same game. Whether they were victorious remains to be seen. But assuming *arguendo* that they are correct, where does that leave the rest of the Latino population as they change the face of this country's neighborhoods?

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120. *Id.*

121. Johnson, *supra* note 113, at 920.

122. Cano v. Davis, 211 F. Supp. 2d 1208, 1247 (C.D. Cal. 2002).

123. *Id.* at 1235, 1243.

124. *Id.* at 1247.

125. *Id.* at 1248.

126. Raising the same questions about whether Latinos are always best suited to represent Latinos in California, the court also highlighted how other Latino voters supported the white incumbent, Howard Berman, because of his strong support for Latino causes. *Id.* 211 F. Supp. 2d at 1248 n.48. *See also* Johnson, *supra* note 113, at 922 n.29, 923.

V. Conclusion

In many ways this essay has fallen into the trap that the mainstream media so expertly creates: a skewed compartmentalization of the stakes at play in debating a law as incredibly expansive, complex and profound as the Voting Rights Act. It is tempting to stay on the course of the high profile battles over congressional and state legislative districts because they have the potential of changing the *face* of democracy. But the VRA, especially Section 5, is much more than redistricting, and has served Latinos well in preventing intimidation at the polls, the use of restrictive identification requirements generally, discriminatory election-day challenge practices, poll site changes and changes in candidate qualifications. These areas, *inter alia*, deserve more space in this discourse.

In addition, the early take on the reauthorization of Section 5, including the federalism concerns inherent in the upcoming debates,[127] is proceeding as if covered jurisdictions are innocent victims of an over-reaching Congress with little attention paid to what appears to be significant noncompliance of preclearance submissions under Section 5, especially in Latino covered jurisdictions.[128] In a newly amended Section 5, should these jurisdictions get a free pass? This area also warrants more research.

Finally, access to the electoral process cannot be so easily conceded at this point in the development of full rights to the franchise for Latinos. The experiences of Florida voters in 2000 shed a national spotlight on voting "malfunctions" that Latinos have seen all too often in their own barrios, before and after 2000. The phenomenon of racially polarized voting – still an issue in emerging Latino communities requiring further elaboration beyond the limits of this essay – is another measure of how access is denied. Add the increasingly important issue of felon disfranchisement in Latino neighborhoods[129] and the pressing need to consider limited forms of non-citizen voting,[130] and one quickly recognizes that access is far from accomplished for Latinos.

But it is the history of democracy in this country, and the lessons it gives us in exclusion, that forces Latinos to recognize the value in having an effective tool for those who struggle to understand why government is not more responsive to their concerns; or why Congress or their state senate

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127. *See* Víctor Andrés Rodríguez, *Comment: Section 5 of the Voting Rights Act of 1965 After* Boerne*: The Beginning of the End of Preclearance?*, 91 Cal. L. Rev. 769 (2003).

128. Symposium, *Drawing Lines*, *supra* note 67, at 12 (statement of José Garza). I thank Joaquín Ávila, a real treasure for all Latino voting rights attorneys, for bringing this point to my attention.

129. Three of the current court challenges to felon disfranchisement laws directly challenge the racial impact these laws have on Latinos: in New York: *Hayden v. Pataki*, No. 00 Civ. 8586 (LMM) 2004 U.S. Dist. LEXIS 10863 *1 (S.D.N.Y. June 14, 2004) (appeal pending); in New Jersey: *New Jersey State Conference – NAACP v. Harvey*, letter opinion (N.J. Super. Ch. Div. June 30, 2004); in Washington: *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003). *See also* Marisa J. Demeo and Steven A. Ochoa, Diminished Voting Power in the Latino Community: The Impact of Felony Disfranchisement Laws in Ten Targeted States (Vibiana Andrade ed., 2003). For a discussion of the discriminatory impact of the criminal justice system and Latinos, *see* Nancy E. Walker et al., Lost Opportunities: The Reality of Latinos in the U.S. Criminal Justice System (2004).

130. Some form of non-citizen voting is critical to Latino political empowerment. *See* Johnson, *supra* note 113, at 928-934; de la Garza & L. DeSipio, *supra* note 36, at 1521-1524.

does not look like them. In this vein, the limited historical portrayal of Puerto Ricans and Mexican Americans in this essay requires further elaboration into Florida's, Arizona's and California's history both before and after Section 5 coverage. However, Latinos can easily recognize that something more than just self-policing by our Latino elected officials, no matter how good they are, is in order; hence the continued need for Section 5, even in a newly amended VRA. And it is hoped that the historical account in this essay enables a shift in the discourse to date, a shift beyond black and white.

Finally, the issues raised herein about whether and how Latinos can integrate the halls of our legislatures as elected officials will be with us for some time. Descriptive representation has tangible benefits in its own right that are not restricted to perception and symbolism, as important as those are in areas of the country where Latinos are still significantly excluded,[131] but that serve as gateways to credible representation of all groups and as vehicles to shatter stereotypes about incompetence.[132] Majority Latino districts, I submit, are still a critical piece in this struggle because the alternatives[133] are either too dependent on the power of incumbency in ways that delimit the opportunities for Latinos should the incumbents leave office[134] (or switch parties), or are overly concerned with other measures of Latino success in the political arena that go beyond direct representation.[135] Section 5 (and Section 203) are tools that preserve the ability to elect *Latinos* to the halls of our legislatures and if the rights that those sections have established are to mean anything, they mean the ability to elect a candidate who is also a member of that Latino community, not the merely the opportunity for Latinos to elect their favorite white candidate to office. To respectfully paraphrase Professor Grofman:[136] once enfranchisement of Latinos is achieved (by virtue of full compliance with the VRA, I would add), much of the history of VRA enforcement in redistricting can be characterized through successful litigation or preclearance denials that seek to stop the practice of the Democratic Party using Latino voters "as sandbags to shore up the reelection chances of *white* Democrats."[137] Moving too

131. Johnson, *supra* note 113, at 923-924.

132. BERNARD GROFMAN ET AL, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY, 134-137 (1992).

133. The alternatives here do not include alternative electoral systems, essentially forms of proportional representation (e.g., cumulative voting, limited voting, preference voting) that retain the at large nature of districts but change the weight of the votes cast, which merit further discussion as a means of providing descriptive representation for Latinos. For a discussion of these proportional representation systems in the context of majority Latino districts in New Jersey, *see* Cartagena, *New Jersey's Multi-member Legislative Districts and Latino Political Power*, *supra* note 101.

134. *Id.*

135. de la Garza & DeSipio, *supra* note 36, at 1517 (where the authors decry the existence of majority Latino districts, what they term "VRA districts" because they "may serve to exacerbate nonparticipation among many Latino adults."). Even when the authors readily and rightfully acknowledge that *Shaw v. Reno* should not establish a victim's modality for non-Hispanic whites because they have suffered no harms comparable to Mexican Americans and Puerto Ricans prior to the VRA (*id.* at 1526), I'm afraid that by rejecting majority Latino districts so readily, the authors may very well be throwing out a good part of the baby with the bathwater. *See also* de la Garza, *supra* note 101, at 115-116.

136. Grofman, *supra* note 109, at 7.

137. *Id.* (emphasis added).

quickly away from majority Latino districts and towards influence districts, without some achievement of parity, is a retreat from the principles that the VRA was intended to achieve. And Latinos need to be wary.